PUSPAVATHY THAVEETHU

v.

MAJLIS PERBANDARAN KLANG & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MA'AMOR J
[CIVIL APPEAL NOS: B-02-666-2000 & B-02-402-2002 & B-02-403-2002]
11 SEPTEMBER 2008

CIVIL PROCEDURE: *Judgments and orders - Order for sale - Setting aside - Non-service of originating summons - Whether rendered order a nullity - Rules of the High Court 1980, O. 2 r. 1*

CIVIL PROCEDURE: *Limitation - Order for sale - Application to set aside - Whether time-barred by s. 8(b) Limitation Act 1953 - Whether s. 2 Public Authorities Protection Act 1948 applicable*

LAND LAW: *Indefeasibility of title and interests - Purchaser of good faith and valuable consideration in public auction sale and duly registered as proprietor - Whether purchaser acquired indefeasible title and interests - Whether s. 340(2)(b) National Land Code applicable - Adorna Properties Sdn Bhd v. Boonsom Boonyanit*

There were three appeals before the court, the first appeal was by the 8th defendant whilst the second and third appeals were by the plaintiff and the 2nd intervener respectively. The facts showed that the 8th defendant was one of eight proprietors of a parcel of land in Telok Pulai, Klang ('the said land') who failed to pay the assessment rate amounting to RM21,887 which led the plaintiff to apply for an order for sale of the said land pursuant to ss. 146, 148 and 151 of the Local Government Act 1976 ('LGA 1976'). The High Court granted the order for sale and the said land was sold by way of public auction to the 2nd intervener who was duly registered as the registered proprietor of the said land. The 2nd intervener subsequently charged the said land to OCBC Bank (Malaysia) Berhad, the 1st intervener, registered as chargee of the said land. Subsequently, the 8th defendant applied to set aside the order for sale alleging that it was a nullity since the originating summons ('OS') was not served on her. The 1st and 2nd

A ineterveners were allowed to intervene in the application by the 8th defendant. The High Court judge allowed the 8th defendant's application but only to the extent of her share in the said land. Hence the appeals herein.

B The following issues arose for determination: (a) whether the non-service of the OS amounted to a mere irregularity or a nullity; (b) whether the 8th defendant's application was time-barred by the one-year period stipulated under s. 8(b) of the Limitation Act 1953 ('the LA 1953 Act'); (c) whether the LA 1953 was C inapplicable to claims pursuant to s. 124 of the LGA 1976 as the said section provided that the Public Authorities Protection Act 1948 ('PAPA 1948') which stipulated a thirty-six months' period *via* s. 2 was applicable; and (d) whether s. 340(2)(b) National Land Code ('NLC') was applicable on the ground that the D certificate of sale was an insufficient or void instrument for the transfer of ownership of the said land to the 2nd intervener.

Held (dismissing first appeal and allowing second and third appeals)

Per Richard Malanjum JCA delivering the judgment of the E **court:**

(1) Order 2 r. 1 of the Rules of the High Court 1980 states that where in beginning with any proceedings, there is a failure to comply with the requirements of these rules, the failure shall F be treated as an irregularity and should not nullify the proceedings. (para 19)

(2) Once an order is made by the court, it is binding and valid until set aside. (para 22)

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(3) The plaintiff's failure to comply with the RHC merely rendered the order for sale obtained irregular and not a nullity. Although the said order might be irregular, it must be obeyed so long as it was not set aside. In fact the said order was further proceeded with. The 2nd intervener already purchased H the said land at the public auction. He had already incurred expenses and had committed to obligations after having purchased the said land. It would be unfair to him to set aside the said order granted by a court of law of competent I authority. (para 23)

(4) In *Lee Hock Ning v. Government of Malaysia*, it was held that the non-payment of monies was not in pursuance of a public duty. Consequently, it could not come within s. 2 of the Public Authorities Protection Ordinance (now PAPA 1948) (see also *Ban Guan Hin Reality Sdn Bhd v. Sunny Yap Chiok Sai & Ors*). It followed that the PAPA 1948 could not be invoked. Section s. 8(b) of the LA 1953 was therefore applicable. However, the period should commence from the date when the sale was confirmed, *ie*, 21 September 1995 and not, as submitted by the plaintiff, from 21 May 1995 which was the publication date of the proclamation of sale in the Malay Mail newspaper. The 8th defendant should have taken action within one year from 21 September 1995. The 8th defendant only filed her application on 21 November 1996. There was therefore a two-month delay and accordingly her application was time-barred under s. 8(b) of the LA 1953. (paras 31, 32 & 33)

(5) The decision by the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* was the law on the indefeasibility of title to land. Hence, there was no question of deprivation of property not in accordance with law. The 2nd intervener acquired an indefeasible title or interests to the said land upon being registered as the registered proprietor. He was a purchaser in good faith and for valuable consideration having paid the balance of the purchase price within the stipulated time following the public auction sale. (paras 40 & 42)

Bahasa Malaysia *Translation Of Headnotes*

Terdapat tiga rayuan di hadapan mahkamah dengan rayuan pertama oleh defendan kelapan sementara rayuan kedua dan ketiga masing-masing oleh plaintif dan pencelah kedua. Fakta menunjukkan bahawa defendan kelapan adalah salah seorang dari pemilik tanah di Telok Pulai, Klang ('tanah tersebut') yang gagal membayar cukai taksiran berjumlah RM21,887 sekaligus menyebabkan plaintif memohon untuk perintah jualan tanah tersebut di bawah ss. 146, 148 dan 151 Akta Kerajaan Tempatan 1976 ('AKT 1976'). Mahkamah Tinggi membenarkan perintah jualan dan tanah tersebut dijual kepada pencelah kedua yang didaftar sebagai pemiliknya. Pencelah kedua kemudian menggadaikan tanah tersebut kepada pencelah pertama, iaitu OCBC Bank (Malaysia) Berhad, yang didaftar sebagai pemegang gadaian tanah tersebut. Defendan kelapan kemudian memohon untuk mengenepikan perintah jualan

dengan mendakwa bahawa ia tak sah disebabkan saman pemula ('SP') telah tidak diserahkan kepada beliau. Apapun, dalam permohonan defendan kelapan ini, pencelah pertama dan kedua telah dibenarkan untuk mencelah. Hakim Mahkamah Tinggi membenarkan permohonan defendan kelapan tetapi hanya setakat bahagian tanah tersebut yang terhak kepadanya. Keputusan ini membangkitkan rayuan-rayuan di sini di mana persoalan-persoalan berikut berbangkit untuk pemutusan: (a) Sama ada ketidak-serahan SP menyebabkan SP menjadi tak sah atau hanya tidak teratur; (b) Sama ada permohonan defendan kelapan telah dibatasi had masa satu tahun yang ditetapkan di bawah s. 8(b) Akta Had Masa 1953 ('AHM 1953'); (c) Sama ada AHM 1953 terpakai bagi tuntutan-tuntutan di bawah s. 124 AKT 1976 memandangkan seksyen tersebut memperuntukkan bahawa Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPA 1948') yang menetapkan tempoh tiga puluh enam bulan melalui s. 2nya, adalah terpakai; dan (d) sama ada s. 340(2)(b) Kanun Tanah Negara ('KTN') terpakai atas alasan bahawa sijil jualan adalah satu instrumen yang tidak memadai atau tak sah bagi pemindahan milikan tanah tersebut kepada pencelah kedua.

Diputuskan (menolak rayuan pertama dan membenarkan rayuan-rayuan kedua dan ketiga)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

(1) Aturan 2 k. 1 Kaedah-Kaedah Mahkamah Tinggi 1980 menyatakan bahawa di mana dalam memulakan sesuatu prosiding terdapat kegagalan mematuhi mana-mana kaedah ini, kegagalan sedemikian hendaklah dianggap sebagai perkara luar-aturan yang tidak menjejaskan kesahan prosiding.

(2) Sebaik sesuatu perintah dibuat oleh mahkamah, ia adalah mengikat dan sah selagi belum diketepikan.

(3) Kegagalan plaintif mematuhi KMT hanya menjadikan perintah jualan yang diperolehi tidak teratur dan bukan satu ketaksahan. Walaupun perintah tersebut mungkin tidak teratur, ia harus masih perlu dipatuhi selagi ia belum diketepikan. Malah perintah tersebut telah diteruskan. Pencelah kedua sudah pun membeli tanah tersebut di lelongan awam. Beliau telah menanggung perbelanjaan dan telah mengkomitkan dirinya kepada obligasi-obligasi selepas pembelian tersebut. Adalah

tidak adil baginya jika perintah yang diberikan oleh sebuah mahkamah yang berkompeten dan berwibawa tersebut diketepikan.

(4) Di dalam *Lee Hock Ning v. Government of Malaysia*, ianya diputuskan bahawa ketidakbayaran wang bukan terbit dari satu tanggungjawab awam. Oleh itu, ia tidak terangkum ke dalam s. 2 Ordinan Perlindungan Pihak Berkuasa Awam (kini APPA 1948) (lihat juga *Ban Guan Hin Reality Sdn Bhd v. Sunny Yap Chiok Sai & Ors*). Ianya mengikut bahawa APPA 1948 tidak boleh dikuatkuasakan. Seksyen 8(b) AHM 1953 dengan itu adalah terpakai. Bagaimanapun, tempohnya harus bermula dari tarikh penjualan disahkan, iaitu 21 September 1995 dan bukannya 21 Mei 1995 yang merupakan tarikh pengisytiharaan penjualan di dalam akhbar Malay Mail seperti yang dihujahkan oleh plaintif. Defendan kelapan harus bertindak dalam tempoh satu tahun dari 21 September 1995. Defendan kelapan hanya memfailkan permohonannya pada 21 November 1996. Oleh itu, terdapat kelengahan selama dua bulan yang bermakna permohonannya telah dibatasi had masa di bawah s. 8(b) AHM 1953.

(5) Keputusan Mahkamah Persekutuan dalam *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* adalah merupakan undang-undang mengenai ketaksangkalan hakmilik kepada tanah. Oleh itu, tidak timbul soal menolak hak dalam hartanah tanpa mengikut undang-undang. Pencelah kedua memperoleh hakmilik tak boleh disangkal atau kepentingan dalam tanah tersebut sebaik didaftarkan sebagai pemilik berdaftar. Beliau merupakan pembeli suci hati dan untuk balasan bernilai setelah membayar harga belian dalam tempoh yang ditetapkan pada jualan melalui lelongan awam tersebut.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Asia Commercial Finance (M) Sdn Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(refd)***

Ban Guan Hin Reality Sdn Bhd v. Sunny Yap Chiok Sai & Ors [1987] 1 LNS 144 ***(refd)***

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Khor Cheng Wah v. Sungei Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Lee Hock Ning v. Government Of Malaysia [1972] 1 LNS 66 ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
Muniandy Thamba Kaundan & Anor v. Development & Commerce Bank Berhad & Anor [1996] 2 CLJ 586 FC ***(refd)***
Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervenr) & Another Case [1994] 2 CLJ 705 SC ***(refd)***

Legislation referred to:
Federal Constitution, art. 13(1)
Limitation Act 1953, s. 8(2), 8(b)
Local Government Act 1976, ss. 124, 146, 148, 151
National Land Code, s. 340(2)(b), (3)
Public Authorities Protection Act 1948, s. 2
Rules of the High Court 1980, O. 2 r. 1, O. 10 rr. 1(1), 5, O. 28 r. 3, O. 83 rr. 2(2), 3

(Civil Appeal No: B-02-666-2000)
For the appellant - George Proctor; M/s YS Woo & Proctor
For the 1st respondent - Puan Jamilah; M/s Rashid Asari & Co
For the 2nd respondent - TL Gan; M/s Yong & Rakan-Rakan
For the 3rd respondent - K Maniam; M/s Skrine

(Civil Appeal No: B-02-403-2002)
For the appellant - K Maniam; M/s Skrine
For the respondents - George Proctor; M/s YS Woo & Proctor

(Civil Appeal No: B-02-402-2002)
For the appellant - Puan Jamilah; M/s Rashid Asari & Co
For the respondents - George Proctor; M/s YS Woo & Proctor

[Appeal from High Court, Shah Alam; Originating Summons No: 24-864-1992]

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum JCA:

Introduction And Background Facts

[1] There are three appeals before us arising from the same matter, Originating Summons No. 24-864-1992. The appeals are as follows:

(a) Civil Appeal No. B-02-666-2000 by the 8th defendant in the originating summons (first appeal);

(b) Civil Appeal No. B-02-402-2002 by the plaintiff in the originating summons (second appeal); and

(c) Civil Appeal B-02-403-2002 by the 2nd intervener in the originating summons (third appeal).

[2] In this judgment the original references in the originating summons to the plaintiff, defendants and interveners are maintained.

[3] Briefly the background fact of the case is that the 8th defendant was one of the eight co-proprietors of a parcel of land held under E7 809 Lot 431 Seksyen MK at TBG Nos. 241 & 243 Jalan Telok Pulai, Klang (the said land).

[4] As the co-proprietors of the said land failed to pay the assessment rate amounting to RM21,887 as at 1 September 1992 the plaintiff filed an application by way of originating summons to the Shah Alam High Court on 9 November 1992 seeking an order for sale of the said land pursuant to ss. 146, 148 and 151 of the Local Government Act 1976.

[5] On 6 July 1994 the High Court at Shah Alam made the Order as prayed for.

[6] Thus, by way of public auction the said land was therefore sold on 6 June 1995. The successful bidder was the 2nd intervener.

[7] In compliance with the order for sale the learned deputy registrar of the High Court Shah Alam duly executed the Certificate of Sale on 21 September 1995.

[8] On 11 December 1995 the 2nd intervener was registered as the registered proprietor of the said land.

[9] As the 2nd intervener had subsequently charged the said land to OCBC Bank (Malaysia) Berhad, the 1st intervener was registered as the chargee of the said land.

[10] On 21 November 1996 the 8th defendant by way of summons in chambers applied to the Shah Alam High Court to set aside the order for sale alleging that it was a nullity since the originating summons was not served on her.

[11] The 1st and 2nd interveners on application were allowed to intervene in the application by the 8th defendant.

[12] On 17 August 2000 the learned High Court Judge allowed the application by the 8th defendant but only to the extent of her 1/16 share in the said land.

[13] Dissatisfied with the order of the learned judge the appellants appealed and these appeals thus came before us.

[14] Having heard the arguments we came to the following decisions, namely:

(a) In respect of the first appeal we dismissed it with costs to be taxed and the deposit to the respondents to account for taxed costs. We were unanimous that s. 8(2) of the Limitation Act applies. We were also of the view that there is merit in the issue of *bona fide* purchaser not only in relation to the appellant in the third appeal but also to the 2nd respondent in the first appeal, namely OCBC Bank (Malaysia) Bhd.; and

(b) In respect of second and third appeals, we allowed them with costs to be taxed and their deposits to be refunded. In other words, we set aside the order the learned High Court Judge to exclude 1/16 share of the 8th defendant.

[15] The appellant in the first appeal is now appealing to the Federal Court against our decisions. This is therefore the reasons in coming to our decisions.

[16] From the submissions made before us we opined that the determinative issues for consideration should be as follows:

(a) whether the non-service of the originating summons amounts to mere irregularity or a nullity;

(b) whether the 8th defendant's application is time barred by virtue of s. 8(b) of the Limitation Act 1953; and

(c) whether s. 340 of the National Land Code confers an indefeasible title on the 2nd intervener.

Issue (a)

[17] The 8th defendant contended that O. 10 r. 5 of the Rules of the High Court 1980 (RHC) requires an originating summons to be served in a manner as a writ ie, O. 10 r. 1(1) and O. 83 rr. 2(2) and 3 also require service on the defendants of the notice to hear originating summons. The affidavit of service filed by the plaintiff showed that only the 6th defendant in the court below

had been served with the notice to hear originating summons. As the originating summons and notice to hear originating summons were not served to the 8th defendant, therefore the plaintiff had failed to comply with O. 10 r. 5 of the RHC 1980 and O. 83 r. 2(2) and O. 28 r. 3 of the RHC 1980. Despite that, the High Court gave an order for sale and the land was sold by Public Auction to the 2nd intervener who later charged the same to the 1st intervener. Therefore the failure to serve the originating summons and the notice to hear originating summons renders the order for sale date 6 July 1994 a nullity. The 8th defendant relied on the case of *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 and *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 SC.

[18] In response the plaintiff argued that the originating summons was served on all defendants at the said address with the 6th defendant receiving and acknowledging receipt on behalf of the other defendants on the following basis:

i. The last known address of the defendants was at the 6th defendant's premises ie, No. 84 Tingkat 1 Jalan Kapar, 41400 Klang, Selangor Darul Ehsan;

ii. There is a joint venture agreement between the 6th defendant and the other landowners for the development of the said property and the title of the same was in the custody of the 6th defendant since 1974;

iii. Prior to the plaintiff's action against the defendant, all notices and/or correspondence were directed and served on the 6th defendant as the addresses and details of the other defendants were not within the plaintiff's knowledge;

iv. The 6th defendant admitted in her affidavit that she had contacted the other defendants including the 8th defendant to settle the claim by the plaintiff however, the other defendants have neglected, refused and/or ignored to respond to 6th defendant's appeal; and

v. The burden of proof lies on the 6th defendant to prove that the originating summons was not served on her if she claims that she did not received the same.

[19] Now, O. 2 r. 1 of the Rules of the High Court 1980 states that where in beginning with any proceedings, there is a failure to comply with the requirements of these rules, the failure shall be treated as an irregularity and shall not nullify the proceedings.

[20] In *Khor Cheng Wah v. Sungei Way Leasing Sdn Bhd* [1997] 1 CLJ 396, the Court of Appeal held that "… after the coming into force of the Rules of High Court 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amounts to non-compliance with one or more of the rules of court result in their being curable irregularities, and not nullities. Indeed, it is quite inappropriate to say an order or decision of a court of unlimited jurisdiction (such as the High Court and other superior courts) that it is a nullity; *Isaacs v. Robertson* [1985] AC 77 followed …".

[21] Similarly, in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 at p. 319, the Federal Court held that "the proper approach is for the court to accept that a breach of a rule of court renders the particular proceedings irregular with a power in the court to excuse the non-compliance. That power, as in all matters calling for crucial discretion, is to be exercised judicially having regard to the substantial merits of the case and having particular regard to the interest of justice. Thus, for example, to say that a judgment entered for too much is automatically bad or is automatically curable is to take an extreme position that is unsustainable in law. Such judgment may be set aside if to cure it by amendment would do greater injustice to the particular defendant. On the other hand, such a judgment may be cured by amendment if not to do thus would result in greater injustice to the plaintiff. Ultimately, it is the objective perception of a court as to where the justice in a particular case lies that determines whether the irregularity should be cured. If the Court decides the particular case to be unfit for the exercise of the curative power, then it may set aside the judgment, order or other proceedings".

[22] It should also be noted that once an order is made by the court it is binding and valid until set aside. In the *Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervener) & Another Case* [1994] 2 CLJ 705, the then Supreme Court states thus:

> We are of the considered view that an order of the superior court such as the High Court, even if it is eg, and order obtained *ex-parte* or a default judgment; until it is set aside, must be obeyed by everyone whether its validity is challenged or not, and it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged; per Romer LJ in *Hadkinson v. Hadkinson*. This passage was quoted with approval and adopted by this court in *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd.* It was stated in *Isaacs v. Robertson* that it was misleading to describe such an order of competent jurisdiction as void or voidable, for every order must be obeyed until it was set aside and 'these are not orders which are void *ipso facto* without the need for proceedings to set them aside'. One of the reasons is that such a superior court must be presumed to have the jurisdiction to make an order which it has made. Every order made by a superior court must be regarded as an order of a competent jurisdiction.

[23] Thus, applying the principles enunciated in the cases above, we are of the view that the plaintiff's failure to comply with the Rules of the High Court merely renders the order for sale obtained on 6 July 1994 irregular and not a nullity of the whole proceeding. At any rate the said order might be irregular nonetheless it had to be obeyed so long as it had not been set aside. Indeed the said order had been further proceeded with. In this case the 2nd intervener had already purchased the said land at the public auction ordered by the court before it was set aside. Hence, to set aside the said order which was then only irregular at such a late stage would therefore be unfair to the 2nd intervener who had already incurred expenses and committed to obligations after having purchased the said land in a public auction pursuant to order for sale by a court of law of competent authority.

Issue (b)

[24] The sequence of events was not in dispute, that is, the said order was made on 6 July 1994, the public auction was held on 6 June 1995 and the Certificate for Sale was issued on 21 September 1995. The application by the 8th defendant was filed on 21 November 1996.

[25] It was the contention of the plaintiff and the 2nd intervener that the application by the 8th defendant was statute-barred under s. 8(b) of the Limitation Act. The section applies because the claim was revenue in nature and when making the claim the

A plaintiff was acting under a delegated power derived from the State Authority. As such the limitation period commenced from the date of the advertisement of the proclamation of sale, that is, 21 May 1995 in the Malay Mail newspaper. There was therefore a delay of 17 months in the application by the 8th defendant.

B

[26] Section 8(b) of the Limitation Act 1953 states as follows:

> An action:
>
> to set aside a sale for arrears of Government or State revenue or
C for any demand recoverable as such arrears;
>
> shall not be brought after the expiration of one (1) year from the date on which the sale is confirmed or would otherwise have become final or conclusive had no such action been bought or when the attachment ceased or transfer or payment was made, as
D the case may be.

[27] However, the 8th defendant contended that s. 8 of the Limitation Act should be read with O. 10 r. 5 of RHC 1980 which requires service of the writ of originating summons to the
E defendants.

[28] Further it was argued that the Limitation Act 1953 does not apply to claims pursuant to s. 124 of the Local Government Act 1976 as that section clearly provides that the Public Authorities
F Protection Ordinance 1948 shall apply to any action, suit, prosecution or proceeding against a Local Authority in respect of any act, neglect or fault done or committed.

[29] Section 124 of the Local Government Act 1976 reads:

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> The Public Authorities Protection Ordinance, 1948, shall apply to any action, suit, prosecution or proceeding against any local authority or against any Councillor, officer, employee, servant or agent of any local authority in respect of any act, neglect or default done or committed.

H **[30]** Section 2 of the Public Authorities Protection Act 1948 states:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceedings is commenced in the Federation against any person for any act done in pursuance or execution or
I intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, any duty or authority the following provisions shall have affect:

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty six-months next after the act, neglect or default complained of or in the case of a continuance of injury or damage, within thirty six months next after the ceasing thereof;.

[31] Now, the scope of 'public duty' under the Public Authorities Protection Ordinance 1948 was considered in the case of *Lee Hock Ning v. Government Of Malaysia* [1972] 1 LNS 66. There it was held that the non-payment of monies was not in pursuance of a public duty. Consequently, it could not have come within the provisions of s. 2 of the Public Authorities Protection Ordinance. It is immaterial that the contract may have been entered into for the purpose of performing a statutory duty. If the act complained of is the breach of contract, the statutory protection of the Ordinance cannot be invoked on the ground that the contract entered into for the purpose of carrying out duties imposed by the contract.

[32] Similarly in the case of *Ban Guan Hin Reality Sdn Bhd v. Sunny Yap Chiok Sai & Ors* [1987] 1 LNS 44 the word 'public duty or authority' was also considered by the court. It was held that that the allegation of fraudulent usage of money paid to the customs authorities cannot be said to be an act done in pursuance or execution or intended execution of any written law, of any public duty or authority or in respect of any alleged neglect or default in the execution thereof and accordingly protection under the Public Authorities Protection Act cannot be invoked.

[33] Thus, having given the varying contentions our anxious consideration and bearing in mind the judicial pronouncements by our courts on the point raised we were inclined to agree that s. 8(b) of the Limitation Act 1953 should apply. However the period should commence from the date when the sale was confirmed, that is, 21 September 1995 and not, as submitted by learned counsel for the plaintiff, from 21 May 1995 which was the publication date of the proclamation of sale in the Malay Mail. The 8th defendant should have therefore taken action within one year from 21 September 1995. In this case the 8th defendant only filed her application on 21 November 1996. There was therefore two months delay and accordingly time-barred under the said s. 8(b).

A **Issue (c)**

[34] In view of our findings above it is not crucial that we should consider this point raised by the 2nd intervener. However in the event that we are wrong in the first two issues we now deal with this issue.

B

[35] Section 340 of the National Land Code (NLC) 1965 confers an indefeasible title to the registered proprietor of any land subject of course to sub-sections 340(2) and (3) NLC.

C **[36]** Section 340 of the NLC reads:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of the section, be indefeasible.
>
> D
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;
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> or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
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>
> (a) it shall be liable to set aside in the hands of any person or body to whom it may subsequently be transferred; and
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> H
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> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.
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> I
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> Provided that nothing in this sun-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[37] On this issue the 8th defendant premised her contention that the Certificate of Sale was an insufficient or void instrument for the transfer of ownership of the said land and relied on s. 340(2)(b) of the NLC. The decision of the Court of Appeal in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 was cited as the correct judicial pronouncement on the point. Alternatively it was argued that the Federal Court decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 reversing the Court of Appeal should be ruled *ultra vires* as it failed to consider art. 13(1) of the Federal Constitution.

[38] With respect we think the 8th defendant failed to appreciate that until and unless the Federal Court in another panel comes up with a different view on such issue or that the decision is invalidated by legislative mean the position of the law for now on indefeasibility should be as propounded by the Federal Court.

[39] Article 13(1) states:

(1) No person shall be deprived of property save in accordance with law.

[40] We find no merit in the alternative argument advanced by the 8th defendant. The decision by the Federal Court in *Adorna Properties Sdn Bhd (supra)* is what the law is on the indefeasibility of title to land. Hence there is no question of deprivation of property not in accordance with law.

[41] There is also merit in the submission by the 2nd intervener when he relied on s. 340(3) of NLC and as interpreted by the Federal Court in *Adorna Properties Sdn Bhd (supra)*. The Federal Court held that 'the proviso to sub-s (3) of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these

A proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they
B acquired their titles under a forged document … even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said land.'

[42] Thus, being a purchaser in good faith and for valuable
C consideration having paid within the stipulated time the balance of the purchase price arising from the public auction sale, the 2nd intervener had acquired an indefeasible title or interest to the said land upon being registered as the registered proprietor.

D **[43]** The foregoing view is not without any judicial support. In *Asia Commercial Finance (M) Sdn Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109, Edgar Joseph Junior J (as he then was) opined that if "on the other hand, the statutory conditions have not been complied with
E the chargee has neither the rights nor the power to sell the land and if he purports to do so any certificate of sale issued pursuant thereto would be void and of no effect but if the proper registering authority registers such a certificate of sale, a *bona fide* purchaser for value without notice would take a good title."

F **Conclusion**

[44] For the reasons herein we were unanimous in coming to our above decision as we did. But it is to be noted that as at the date of rendering these reasons in writing our learned brother YA Dato'
G Azmel bin Haji Ma'amor has since retired. YA Tengku Dato' Baharudin Shah bin Tengku Mahmud has however read this judgment in draft and agreed with it.

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